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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANGEL SANTAMARIA BONILLAS, Appellant.	2 CA-CR 2009-0183 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053448

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

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V Á S Q U E Z, Judge.

¶1 Following a jury trial in 2009, appellant Angel Bonillas was convicted of second-degree murder, a class one felony. The trial court sentenced him to the

presumptive, sixteen-year prison term, to be served concurrently with a prison term he was serving in a federal matter, with credit for 1,227 days served. On appeal, Bonillas maintains the trial court erred in denying his motion to suppress statements he had made to a police officer after he was placed in custody, claiming he was interrogated improperly without first receiving the *Miranda*[1] warning. He also asserts the trial court erred in denying his motion for a new trial. We affirm.

Background

¶2 We view the facts and all reasonable inferences from those facts in the light most favorable to upholding the verdict. *State v. Taylor*, 196 Ariz. 584, ¶ 2, 2 P.3d 674, 676 (App. 1999). In July 2005, Bonillas attended a family birthday celebration in Tucson at the home of his nephew, A. After the celebration ended, Bonillas remained and continued to drink with M., A.'s brother and Bonillas's other nephew. Early the next morning, Bonillas and M. were having a "drunk" conversation when A. noted that Bonillas had a gun and a knife. Concerned for M.'s safety, A. called the police and another brother for help, and locked Bonillas inside the house behind a metal security door to separate M. from Bonillas. Bonillas shot through the metal door, fatally wounding M. In an effort to get away from Bonillas, M.'s brothers transported M. to the nearest major intersection, calling an ambulance to meet them while en route.

¶3 Pima County Sheriff's Deputy Andrew Loza arrived at the residence and encountered Bonillas in a nearby alley. Loza asked Bonillas, "What's going on?" and Bonillas told Loza he "[had done] it and he was turning himself in." Loza placed

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Bonillas in handcuffs and put him in his patrol car. Bonillas then told Loza that he had left his gun in the alley. Bonillas was charged with first-degree murder. A jury found him guilty of the lesser-included offense of second-degree murder.

Motion to Suppress

¶4 Bonillas contends the trial court erred when it denied his motion to suppress statements he made in response to questions by Loza, claiming he was interrogated in violation of *Miranda*. When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the court's ruling. *See State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We review a trial court's denial of a motion to suppress evidence for an abuse of discretion. *See State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). "We defer to the superior court's factual determinations; however, to the extent its ultimate ruling is a conclusion of law, we review de novo." *Id.*

¶5 Loza testified at the suppression hearing that after finding no one in the house where the incident had occurred, he looked for witnesses outside and saw Bonillas in a nearby alley. Not thinking that Bonillas was the shooter, Loza asked him, "What's going on?" and Bonillas responded, "I did it and I'm going to give up." Loza then conducted a pat-down search and handcuffed Bonillas. Bonillas asked Loza if "he [M.] was dead," and spontaneously told Loza "someone was trying to punk him, so he had to do him." [2] Loza placed Bonillas in his patrol car, without giving Bonillas the *Miranda*

[2]Bonillas explained that "punk" means someone is going to "beat you up or they're better than you."

warnings. Bonillas began talking "non-stop," telling Loza, among other things, that he was "trying to wing" M., and he had left his ".45" gun in the alley.

¶6 In contrast, Bonillas testified that when Loza first approached him in the alley, Loza had asked him if he had been involved in the incident. Without giving him the *Miranda* warning, Loza placed Bonillas in handcuffs and asked him what had happened. Bonillas responded with a long account of the incidents that led up to the shooting, including the fact that M. had "started punking" him. Loza testified on redirect examination that if Bonillas had told him the details of the events leading up to the shooting, he would have included that information in his incident report; the report, which was admitted at the suppression hearing, did not contain any such information. Bonillas testified he would not have told Loza what happened if Loza had not asked him. Notably, Bonillas conceded that in the three years since the shooting had occurred, he had never repeated to police the version of the incident he claimed at the suppression hearing to have given to Loza.

¶7 Bonillas does not challenge the admission of guilt he made when he first met Loza in the alley. Rather, he maintains the statements he made after he was placed in handcuffs should not have been admitted. A defendant need not be given *Miranda* warnings unless the defendant is in custody. *See State v. Flores*, 201 Ariz. 239, ¶ 4, 33 P.3d 1177, 1178 (App. 2001). The issue here is not whether Bonillas was in custody once Loza placed him in handcuffs and transferred him to his patrol car. Rather, the question is whether the statements Bonillas made after he was in custody were unsolicited, and thus not subject to *Miranda*'s procedural safeguards. *See State v. Carter*,

145 Ariz. 101, 106, 700 P.2d 488, 493 (1985) (admission of accused's spontaneous, voluntary statement not made in response to police interrogation neither violates defendant's constitutional rights, nor principles announced in *Miranda*). Loza testified repeatedly that, after he placed Bonillas in custody, he did not question him and that Bonillas's statements were not made in response to his questions. In fact, Loza "let [Bonillas] know several times that the detectives were going to talk to him in a minute." While Loza remained in his patrol car waiting for the detectives to question Bonillas, he asked Bonillas only if he wanted water, if the air conditioning was "okay" for him, and who various family members were as they arrived at the scene.

¶8 Crediting Loza's version of the events as it was entitled to do, the trial court concluded that no *Miranda* violation had occurred. *See State v. Waggoner*, 139 Ariz. 443, 445, 679 P.2d 89, 91 (App. 1983) (*Miranda* warning not required where officer's questions not likely to elicit incriminating response). In denying the motion to suppress, the court found Loza had "asked no questions . . . relating to the crime. . . . Any statements made by the defendant relating to his involvement with the shooting after he was taken into custody were spontaneous statements not elicited in response to any questions propounded by the Deputy." Because that conclusion finds support in Loza's testimony, and because spontaneous statements by a defendant are admissible regardless of whether a defendant has received a *Miranda* advisory, the court did not abuse its discretion by denying the motion to suppress.

Motion for New Trial

¶9 Two days after the trial concluded, the trial court advised counsel that Loza's supplemental narrative report, an exhibit that had not been admitted into evidence at trial, had been "inadvertently sent back to the jury as an admitted exhibit." Bonillas filed a motion for new trial, which the court denied following a hearing. On appeal, Bonillas contends the court erred by denying his motion, asserting his defense of self-defense was compromised by permitting the jury to see the supplemental report for the following reasons: (1) although Loza testified that Bonillas had told him "somebody was trying to punk him so he had to do him," his guilt was emphasized further to the jurors by permitting them to see this statement in the supplemental report; (2) although Loza testified Bonillas had told him he had left his gun in the alley, the supplemental report further informed the jury he had done so in order to avoid having the police find him with the gun; (3) although the jury knew Bonillas had been interviewed by detectives, the supplemental report invited the jury to speculate about what Bonillas had said during the interview; (4) the supplemental report did not include Bonillas's statement to Loza that Bonillas was "pretty sure" M. had a gun; and, (5) because the supplemental report was the only narrative item of evidence to go to the jury, the jury probably paid undue attention to it.

¶10 Rule 24.1(c)(3)(i), Ariz. R. Crim. P., provides that when jurors have received evidence "not properly admitted during the trial," the trial court may grant a new trial. When a defendant challenges the validity of a jury's verdict pursuant to Rule 24.1(c), "the court may receive the testimony or affidavit of any witness, including

members of the jury, which relates to the conduct of a juror [or] official of the court." Ariz. R. Crim. P. 24.1(d). We review a trial court's ruling on a motion for new trial based on jury misconduct for an abuse of discretion. *See State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). A defendant is entitled to a new trial when extraneous information reaches the jury unless the court can conclude beyond a reasonable doubt the information did not contribute to the verdict. *See State v. Allgood*, 171 Ariz. 522, 526, 831 P.2d 1290, 1294 (App. 1992). Juror misconduct warrants a new trial only if the defendant shows actual prejudice or if such prejudice may fairly be presumed from the facts. *See State v. Davolt*, 207 Ariz. 191, ¶ 58, 84 P.3d 456, 473 (2004). "Once the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d at 94.

¶11 At the hearing on the motion for new trial, defense counsel acknowledged he did not know whether the jurors had considered the supplemental report, but assumed they had. The trial court found "there was no proof that the jury, in fact, considered this extraneous evidence in its deliberations." It therefore denied Bonillas's motion. On appeal, Bonillas contends "the court or the state" should have brought in the jurors and questioned them about their use of the report. However, because he "bore the initial burden of proving that the jurors . . . considered extrinsic evidence," *id.* ¶ 17, it fell to him to substantiate his allegation they had considered the report. *See State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991) (allegation of improper juror

communication during trial did not require new trial when appellant failed to substantiate allegation with affidavits or request juror voir dire).

¶12 Moreover, applying the five factors[3] identified by the Ninth Circuit and employed by our supreme court in *Hall* to the facts in this case, the trial court concluded that, even if the jurors had considered the extraneous evidence, Bonillas was not prejudiced. The court concluded the first and third factors did not apply (prejudicial statement not ambiguously phrased and no curative instruction given). As to the second factor, whether the information in the supplemental report was merely cumulative, the court found the information had been "largely admitted through the examination of witnesses during the trial and was largely cumulative of the evidence adduced at trial."

¶13 The trial court then addressed the fourth factor, the trial context, and noted it had "considered all of the evidence presented," including Loza's statements, his report, direct and cross-examination of Loza, and the jury's questions, and all the concerns Bonillas was now raising had been addressed at trial. Addressing the fifth factor, whether the extraneous evidence was "insufficiently prejudicial given the issues and the evidence in the case," the court concluded:

> The Court gives the same weight to the additional evidence of Mr. Bonillas not wanting to be found with the gun when he was stopped by the police as it gives to the evidence that was presented during the trial, that he walked away from the scene of the shooting. The Court sees no difference in the evidence

[3]The five factors include: (1) whether the prejudicial statement was phrased ambiguously; (2) whether the extraneous information otherwise was admissible or merely cumulative of evidence presented at trial; (3) whether a curative instruction was given or some other step taken to cure the prejudice; (4) the trial context; and (5) whether the statement was insufficiently prejudicial. *Hall*, 204 Ariz. 442, ¶ 19, 65 P.3d at 96.

> between his desire to leave the scene, where he had shot his nephew, as it finds his decision to leave the gun in a place different than the shooting or separating it from himself.

The court thus found proof beyond a reasonable doubt that the supplemental report was "insufficiently prejudicial given the issues and evidence in the case" and that there was "no relationship or connection" between the report and the verdict. The court did not abuse its discretion by denying the motion for new trial.

¶14 We affirm the trial court's denial of Bonillas's motion to suppress and motion for new trial, and therefore affirm his conviction and sentence.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge